Supreme Court, U.S.
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No. 92-723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PACIFIC EXPRESS, INC.,
Petitioner,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR UNITED AIR LINES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to present evidence showing that respondent's expansion of airline service in 1983 resulted in "antitrust injury."

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. United Air Lines, Inc., is a wholly-owned subsidiary of UAL, Inc.

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STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Pacific Express was an airline that operated for about two years, from January 1982 until February 1984. It operated principally on routes connecting relatively small cities on the West Coast with San Francisco and Los Angeles. SER 99, p. A-76.[1]

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[1] "SER" and "ER" refer to the Supplemental Excerpt of Record and the Excerpt of Record filed in the court of appeals. "RT" refers to the Reporter's Transcript filed in the district court.

In the fall of 1983, after months of planning, respondent United Air Lines undertook a general expansion of its operations at San Francisco International Airport, which was a "hub" airport in United's system. ER 111, pp. 3-5. The expansion included three new routes from San Francisco that were also flown by Pacific Express; in addition, the expansion increased the number of flights on various existing United routes, some of which were served by Pacific Express.[2] *Id.* p. 4. United did not introduce fares lower than those of Pacific Express; as Pacific Express' own witnesses conceded, Pacific Express "tended to have the lowest fares in all markets," and United lowered its fares to meet Pacific Express, not the other way around. SER 99, pp. A-114, A-115, A-134, A-135, A-136, A-157.

United continued to serve all of the expansion routes for at least four years, long after the exit of Pacific Express in February 1984. ER 111, p. 5; SER 162. On a number of Pacific Express' old routes United continued to face competition from other carriers. SER 99, pp. A-173, A-174.[3]

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[2] Pacific Express asserts that United scheduled its new flights to match or "sandwich" Pacific Express' flights. Pet. 5. There is nothing in the record to support this claim; the affidavits cited by Pacific Express certainly provide no support. In any event, it is not unlawful for an airline to offer competitive schedules.

[3] The fact that there is only one carrier on a "thin route," as many of Pacific Express' routes were, does not show monopoly power, *i.e.*, power to control price or to exclude competition. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Although the district court did not find it necessary to rule on the point, United showed below that it had no probability of achieving monopoly power because of the ease with which air carriers can enter each other's routes. ER 94, pp. 5-14. There is also no support for the assertion that United raised fares after Pacific Express went out of business. The evidence on which Pacific Express relies for this assertion is a comparison of Pacific Express' yields in 1983 (4th quarter) with United's yields in 1984, truly an apples to oranges comparison. ER 106, p. 235.

In May 1984, after Pacific Express went bankrupt, United entered into a "feeder" agreement with a small carrier in California, Westair Commuter Airlines. ER-106, Westair Agreement. The agreement by its terms did not prevent the parties from competing with each other. *Id.* § 3, p. 273. In fact, Westair and United both continued to serve some of the same routes. SER 103, p. 4, ¶ 14; SER 99, pp. A-173, A-174.

B. Proceedings Below

1. Pacific Express filed this suit in July 1984, claiming that United attempted to monopolize "various air passenger routes" in violation of Section 2 of the Sherman Act. Complaint, ¶ 12. The complaint also alleged that United's conduct was tortious. *Id.* ¶¶ 20-24.

After extensive discovery, United filed a motion for summary judgment. In its response, Pacific Express took the position that the *only* source of its injury was United's 1983 expansion of service. ER First Opp. Br. p. 36. The alleged injury was that United had "ousted Pacific Express from its natural market monopolies." *Id.* pp. 40-41.

As the district court recognized, Pacific Express presented "no evidence" that the expansion of service "involve[d] any unlawful restraint of trade or any other apparent illegal means." ER RT 11-2-90, p. 5. Pacific Express conceded that "this is not a predatory pricing case" and that the "conduct here is not predatory pricing as that term has been defined." [4] ER First Opp. Br. pp. 15, 38. It also stated that its allegations involving gate space, United's operation of its computerized reservation system, and Pacific Express' unsuccessful attempt to nego-

[4] Pacific Express elaborated on this point by saying that "[t]o characterize what United did as 'predatory pricing' would be to stand the concept on its head. Here, it was Pacific Express who was the dominating factor, in many, if not most, of the markets in which it flew." ER First Opp. Br. p. 37.

tiate a feeder agreement with United were "*not* conduct elements which Pacific Express claims are causally linked to its marketplace demise." *Id.* p. 35 (emphasis in the original). Rather, its claim was that Pacific Express was injured simply because United introduced expanded service on Pacific Express' routes in the fall of 1983.

The district court granted summary judgment on Pacific Express' antitrust claim because United's expansion of airline service could not be the cause of "antitrust injury," which an antitrust plaintiff must show in order to recover damages. ER RT 10-1-90, pp. 6-8. The district court also granted United's motion for summary judgment on the tort claim. ER RT 11-2-90, pp. 4-7.

2. The court of appeals affirmed in a unanimous opinion. Pet. App. A-1 through A-12. Citing this Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the court of appeals held that there was no evidence of antitrust injury because, "[e]ven assuming that an inference of anti-competitive intent can be drawn," Pacific Express had failed to show "that its injury was caused by anticompetitive or predatory aspects of United's conduct, not by competition." Pet. App. A-7, A-8. While Pacific Express was undoubtedly affected by United's expansion of service on its routes, it "has not shown that its losses were caused by anything other than increased competition." *Id.* at A-9. Because antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny," Pacific Express had failed to prove this essential element of its claim. *Id.* at A-8.

The court of appeals also affirmed the dismissal of the tort claim. Pet. App. A-12.

Pacific Express' petition for a writ of certiorari is limited to its antitrust claim. It has evidently abandoned the tort claim.

REASONS FOR DENYING THE WRIT

The decision below is correct and raises no question that warrants review by this Court. The court of appeals engaged in a straightforward application of the well-settled "antitrust injury" doctrine, which was restated recently by this Court in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990). The only injury of which Pacific Express complained in the district court was the loss of business it allegedly suffered as a result of United's expansion of service on routes flown by Pacific Express. The expansion of service in this case represented the offering of more competitive choices to consumers. There was no evidence that the expansion was carried out by illegal means. Indeed, Pacific Express did not even claim that United engaged in predatory pricing or other anticompetitive actions in connection with its expansion. The court of appeals correctly concluded that the antitrust claim should be dismissed because there was no evidence that Pacific Express' alleged injury "was caused by anticompetitive or predatory aspects of United's conduct, [rather than] by competition." Pet. App. A-7, A-8.

This case raises no legal issue of general importance. Clearly there is no need for the Court to address again the "antitrust injury" doctrine, which it so recently reiterated in *Atlantic Richfield.* At most, Pacific Express is complaining about the court of appeals' application of settled law to a specific set of facts. Pacific Express does not even attempt to argue that the decision below conflicts with the decision of any other court of appeals.

The two grounds Pacific Express advances for granting the writ are completely without substance.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S DECISION IN EASTMAN KODAK

Pacific Express argues (Pet. 7) that the court of appeals adopted "United's proffered business justification

in the face of strong, contrary evidence," in supposed conflict with the summary judgment standard for antitrust cases set forth in *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 112 S.Ct. 2072 (1992). There is no such conflict.

The court of appeals did *not* make any ruling about "business justification" in disposing of the antitrust claim. Indeed, it assumed for the sake of argument "that an inference of anti-competitive intent can be drawn" from the circumstances surrounding United's expansion of service. Pet. App. A-7. The antitrust claim was dismissed because there was no evidence showing "antitrust injury," *i.e.*, that the alleged injury was caused by "predatory or anticompetitive conduct" rather than increased competition. *Id.* at A-8, A-9. The assertion that the court of appeals applied an improper summary judgment standard by assessing the "business justification" for the 1983 service expansion is completely wrong.[5]

II. THE COURT OF APPEALS DID NOT HOLD THAT ENTRY CAN NEVER BE PREDATORY

Pacific Express argues that "[t]o the extent that the Ninth Circuit opinion implies that entry cannot be predatory in any circumstance," the court below committed a "major error." Pet. 10. The argument is frivolous. The court of appeals did not hold or imply or even remotely suggest that entry into new markets can never be "predatory in any circumstance." The decision below focused only on United's expansion of service in 1983, and it held only that there was no evidence of any anticompetitive or predatory conduct that caused injury to

[5] In fact, there was unrebutted evidence that the expansion was fully justified in business terms, representing simply a decision by United to offer new services on a number of routes in an attempt to attract more business. Pet. App. C-5, C-6. However, the court of appeals relied on this evidence only in connection with its ruling on the tort claim. See *id.* at A-11.

Pacific Express. The opinion did not purport to deal with other market entries by other companies in other circumstances. It merely applied the "antitrust injury" doctrine to the facts of this case.

Pacific Express also asserts that the court of appeals suggested that conspiracy among competitors is an appropriate method to "survive and prosper," which it says is by itself enough to "warrant[] at least *per curiam* reversal." Pet. 7, 10-11. In fact, the court of appeals said nothing to encourage cartels or conspiracies.[6] It simply noted that United and Pacific Express at one point had attempted to negotiate an arrangement under which Pacific Express would "serve routes not flown by United in order to provide United's long distance flights with passengers." Pet. App. A-8, A-9. Such arrangements clearly are not cartels or anticompetitive. The court's observation that Pacific Express "may have survived and prospered" if the negotiations had succeeded (*id.* at A-9) is an unremarkable comment that played no role in its decision concerning antitrust injury.

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[6] The assertions in the petition (at 10-11) that United "tendered to Pacific Express an agreement to form a cartel," and that United retaliated because Pacific Express refused to "knuckl[e] under to United's demand that it not compete against it" are irrelevant to the court of appeals' antitrust injury analysis and at odds with record evidence. See, *e.g.*, Pet. App. C-4, C-5, C-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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